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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-655

J.B.K., INC., ET AL.,
Petitioners,

vs.

NORMAN CARON, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, J.B.K., Inc., d/b/a Magic Touch, Kingsmen II, d/b/a King's Harem, S.L.S., Inc., d/b/a Relaxation Station, C-Sun, Inc., d/b/a Garden of Eden Health Spa, T.D.C., Inc., d/b/a Your Way Health Spa, L.T.D. Enterprises, d/b/a Classy Lady Health Spa, T.R.I. Company, d/b/a Afternoon Delight Health Spa, Lone-Star Enterprises, d/b/a Wild West Pleasure Palace, and Diamond Enterprises, d/b/a Fantastic Fantasy Health Spa,* petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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*Other appellants below, namely Marilyn Schaefer, a/k/a Ann Watson, d/b/a Foxy Lady Health Spa and d/b/a Hideaway Health Club Spa; Club 107, Inc., d/b/a Club 107 and d/b/a Grandview Fitness Center; G & G Enterprises, Inc., d/b/a Unique Health Spa; E & H Enterprises, Inc., d/b/a Beaver Lodge; Franko Therapeutics, Inc., d/b/a Aristocrat House Health Spa, and Shirley Edwards, do not join in this Petition.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A6) is reported at 600 F.2d 710 (8th Cir. 1979). The opinion of the District Court (App. B, pp. A7-A28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1979. Petitioner's timely motion for rehearing or alternatively, for rehearing en banc, was denied on July 23, 1979 (App. C, *infra*, p. A29). This Honorable Court's jurisdiction is invoked pursuant to 28 USC 1254 (1).

QUESTION PRESENTED

1. Whether the Appellate and Trial Courts decision to deny preliminary relief in this case was bottomed upon the proper test to be employed when the facts present an issue under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution:

(A) Has an important question of Federal law been decided by the Court of Appeals which has not been, but should be, finally settled by this Court, to-wit: should the traditional "two-tier" analysical framework for reviewing legislative classifications under the equal protection clause be used or should Justice Marshall's test (as expressed in *e.g., Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972)) be used, *i.e.*, whether there is an appropriate governmental interest suitably furthered by the differential treatment.

THE CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Constitution, Amendment One.

Amendment One

Congress shall make no law . . . abridging the freedom of speech . . . .

U. S. Constitution, Amendment Fourteen.

Amendment Fourteen

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. I, §9, Cl. 3, U. S. Constitution.

Art. I, §9

No Bill of Attainder or ex post facto Law shall be passed.

Art. I, §10, U. S. Constitution.

Art. I, §10

No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. * * *

Chapter 567

PROSTITUTION

Sec.

567.010. Chapter definitions.

567.020. Prostitution.

567.030. Patronizing prostitution.

567.040. Prostitution and patronizing prostitution—sex of parties no defense, when.

567.050. Promoting prostitution in the first degree.

567.060. Promoting prostitution in the second degree.

567.070. Promoting prostitution in the third degree.

567.080. Prostitution houses deemed public nuisances.

567.090. Preemption and standardization.

567.100. Responsibilities of prosecuting attorneys and attorney general.

567.010. Chapter definitions

As used in this chapter, the following terms mean:

(1) "Promoting prostitution", a person "promotes prostitution" if, acting other than as a prostitute, or a patron of a prostitute, he knowingly

(a) Causes or aids a person to commit or engage in prostitution; or

(b) Procures or solicits patrons for prostitution; or

(c) Provides persons or premises for prostitution purposes; or

(d) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(e) Accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activities; or

(f) Engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution;

(2) "Prostitution", a person commits "prostitution" if he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person;

(3) "Patronizing prostitution", a person "patronizes prostitution" if

(a) Pursuant to a prior understanding, he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or

(b) He gives or agrees to give something of value to another person on an understanding that in return therefor that person or a third person will engage in sexual conduct with him or with another; or

(c) He solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another, in return for something of value;

(4) "Sexual conduct" occurs when there is

(a) "Sexual intercourse" which means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; or

(b) "Deviate sexual intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person; or

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party;

(5) "Something of value" means any money or property, or any token, object or article exchangeable for money or property.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.020. Prostitution

1. A person commits the crime of prostitution if he performs an act of prostitution.

2. Prostitution is a class B misdemeanor.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.030. Patronizing prostitution

1. A person commits the crime of patronizing prostitution if he patronizes prostitution.

2. Patronizing prostitution is a class B misdemeanor.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.040. Prostitution and patronizing prostitution—sex of parties no defense, when

In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that

(1) Both persons were of the same sex; or

(2) The person who received, agreed to receive or solicited something of value was a male and the person who gave or agreed or offered to give something of value was a female.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.050. Promoting prostitution in the first degree

1. A person commits the crime of promoting prostitution in the first degree if he knowingly

(1) Promotes prostitution by compelling a person to enter into, engage in, or remain in prostitution; or

(2) Promotes prostitution of a person less than sixteen years old.

2. The term "compelling" includes

(1) The use of forcible compulsion;

(2) The use of a drug or intoxicating substance to render a person incapable of controlling his conduct or appreciating its nature;

(3) Withholding or threatening to withhold dangerous drugs or a narcotic from a drug dependent person.

3. Promoting prostitution in the first degree is a class B felony.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.060. Promoting prostitution in the second degree

1. A person commits the crime of promoting prostitution in the second degree if he knowingly promotes prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

2. Promoting prostitution in the second degree is a class C felony.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.070. Promoting prostitution in the third degree

1. A person commits the crime of promoting prostitution in the third degree if he knowingly promotes prostitution.

2. Promoting prostitution in the third degree is a class D felony.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.080. Prostitution houses deemed public nuisances

1. Any room, building or other structure regularly used for sexual contact for pay as defined in section 567.010 or any unlawful prostitution activity prohibited by this chapter is a public nuisance.

2. The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal sanctions, prosecute a suit in equity to enjoin the nuisance.

If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for sexual contact for pay or unlawful prostitution activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

3. All persons, including owners, lessees, officers, agents, inmates or employees, aiding or facilitating such a nuisance may be made defendants in any suit to enjoin the nuisance, and they may be enjoined from engaging in any sexual contact for pay or unlawful prostitution activity anywhere within the jurisdiction of the court.

4. Appeals shall be allowed from the judgment of the court as in other civil actions.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.090. Preemption and standardization

The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by felony sections 567.050 through 567.070, to promote statewide control of prostitution, and to standardize laws that governmental subdivisions may adopt in other areas covered by this chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by sections 567.050 through 567.070 subject to a criminal or civil penalty or sanction of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil penalties or sanctions under other provisions of this chapter, but the provisions of such laws shall be the same

and the authorized penalties or sanctions under such laws shall not be greater than those of this chapter. Cities and towns may also enact and enforce laws prohibiting and penalizing public solicitation of sexual conduct, whether or not the offer to engage in sexual conduct is in return for something of value, and health laws to prevent the spread of venereal diseases.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

567.100 Responsibilities of prosecuting attorneys and attorney general

In addition to the responsibility of circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the criminal provisions of this chapter, they shall have the duty to enforce the provisions of section 567.080; and the attorney general shall have a concurrent duty to enforce the civil provisions of section 567.080.

L.1977, p. ....., S.B.No.60, § 1, eff. Jan. 1, 1979.

STATEMENT OF THE CASE

On December 14, 1978, Plaintiffs, all of whom are individuals and/or corporations engaged in the business of operating massage parlors in the State of Missouri, filed a verified complaint in the United States District Court for the Western District of Missouri. Plaintiffs simultaneously filed a motion for temporary restraining order with supporting suggestions and a motion for preliminary injunction, together with suggestions in support thereof.

A temporary restraining order was issued, and thereafter a hearing on the motion for preliminary injunction was held on January 3, 1979.

Prior to the hearing, the Defendants, all of whom were either state, county or local law enforcement or prosecutorial officials in the State of Missouri, responded to the complaint, some pursuant to a formal answer, others pursuant to a motion to dismiss. Rule 12(b)(1), (6), F.R. Civ. P.

A transcript of all proceedings in the lower court was made and will be filed with this Court.[1] After the hearing on the motion for a temporary injunction, on January 3, 1979, the cause was continued; and on January 9, 1979, the Court below denied the relief sought (*i.e.*, issuance of a temporary injunction). Thereafter, on January 12, 1979, the trial court issued a memorandum opinion which constituted findings of fact and conclusions of law. Although the Trial Court found that Petitioners demonstrated "irreparable injury", it found Petitioners had not convinced the Court that they would succeed on the merits or that they demonstrated sufficiently serious questions going to the merits or that the balance of hardship tipped in their favor. Thereafter, pursuant to 28 USC 1292(a)(1) and Rules 3 and 4, Federal Rules of Appellate Procedure, Petitioners took an interlocutory appeal to the U. S. Court of Appeals for the Eighth Circuit which affirmed the lower court's denial of injunctive relief.

Petitioners invoked the trial court's jurisdiction pursuant to 42 USC 1983, 28 USC 1331, 1343(3), 28 USC 2201-2202, Petitioners being licensed and taxed massage

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1. The official court reporter's transcript of proceedings of January 3, 1979 consisting of 61 pages will be referred to as "Tr. 1/3/79, p. ....". Throughout this Petition, reference will be made to various portions of the Record by stating the name of the document referred to, followed by the date of filing (*i.e.*, "COMPLAINT, 12/14/78" or "ORDER, 1/9/79"). Petitioners elected pursuant to Rule 30(h), F.R. App. P. and Rule 11, Local Rules, Court of Appeals for the Eighth Circuit, to proceed on the original designated record below.

parlor operators in the State of Missouri who, as of January 1, 1979, would be criminally and otherwise liable under the provisions of Sections 567.010-567.100, R.S.Mo., and particularly directed their attack upon those provisions prohibiting "sexual contact," defined as the "touching, manual or otherwise, of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party." Other provisions of the Statutes were also attacked as unconstitutional.

The evidence showed that Petitioners were all legitimate, licensed and taxed operators of massage parlors, each and every one of whom had invested in excess of $10,000.00 in their respective businesses, and were engaged in offering the services of masseuses who were women to male customers to furnish massages to take place in private and not in public. The services to be provided were in the nature of "sexual contact" which was declared to be "prostitution" under the new Missouri law (COMPLAINT, 12/14/78, and supporting affidavits).

The evidence showed that the newly-enacted statutes, Sections 567.010, *et seq.*, R.S.Mo., could and would be applicable to the Plaintiffs and permit and require their prosecution under said provisions. Additionally, the complainants' businesses were such that they could be declared "public nuisances" and shut down for as long as one year at a time, under the provisions of Section 567.080, R.S.Mo. These statutes superceded and preempted local ordinances, Section 567.090, R.S.Mo., and enforcement of these statutes was declared to be the responsibility of both state and county prosecutors. Section 567.100, R.S.Mo. (COMPLAINT, 12/14/78).

Included in the statutory proscriptions was that of "sexual conduct", specifically to include "sexual contact", Section 567.010(4)(c), R.S.Mo., which was criminally con-

demned where such conduct took place for money or anything else of value. Section 567.010(5), R.S.Mo.

It was further established as a matter of undisputed fact that the complainants' conduct would bring prosecution under the above statutes because the massage administered by the female employees to male customers involved the touching and/or massaging of the male genitalia (COMPLAINT, 12/14/78).

At the hearing on motion for temporary injunction held on January 3, 1979, the following facts were adduced:

Introduced into evidence was the affidavit of Professor Edwin Hunvald, Professor of Law, University of Missouri at Columbia, as to the purpose of newly-enacted legislation, including Sections 567.010, *et seq.*, R.S.Mo. (Tr. 1/3/79, pp. 7-8, Exhibit 1) and detailing the legislative history of these statutes. Professor Hunvald's testimony related that the sole justification for the enactment of these statutes, at least as they applied or might apply to the Plaintiffs, was to control the spread of venereal disease (Tr. 1/3/79, p. 11; HUNVALD AFFIDAVIT). Professor Hunvald's testimony showed, by way of the comments made by the drafters of the proposed Missouri code, which were attached to Professor Hunvald's Affidavit, that there were valid arguments for making prostitution legal. Hunvald's testimony also showed that sexual conduct not for hire was *not* prohibited under the new Missouri Statutes, and that sexual conduct for hire involving certain sexual fetishes was similarly not prohibited.

The verified complaint was introduced into evidence (Tr. 1/3/79, p. 12, Exhibit 2).

Mr. Thomas I. Cylar, Assistant Director of the Venereal Disease Control Clinic covering several Western Missouri counties, testified as an expert witness for the Plaintiffs

that massage parlor operations and sexual activity therein had never been a cause for the spread of venereal disease (Tr. 1/3/79, pp. 13-16).

One of the Plaintiffs, Schaeffer, testified as to her knowledge and experiences, both as a massage parlor operator for a five-year period of time, and as Secretary of the Missouri Massage Association (Tr. 1/3/79, pp. 17-23). It was established from Ms. Schaeffer's testimony that, in all such businesses, the masseuses were females, the customers males.

The affidavits of two physicians, Dr. Elliott and Dr. Colom, were admitted into evidence (Tr. 1/3/79, pp. 23-25, Exhibits 3 and 4). In their testimony, these two physicians stated that there were *no* detrimental effects, and in fact, innumerable benefits, to massage, including the masturbatory function, in their professional opinions. Dr. Elliott testified that venereal disease would not likely be contracted through sexual touching. Dr. Colom's affidavit also established that the conduct of masturbation was widespread amongst American males, and that it was a medically-accepted treatment practiced by such medical practitioners as Masters and Johnson.

The testimony of State Representative O'Toole was admitted into evidence (Tr. 1/3/79, pp. 26-32). His testimony, like that of State Senator Caskey (Tr. 1/3/79, pp. 30-33), established Professor Hunvald's connection with the then-proposed and ultimately enacted legislation herein involved, and showed that the only possible reason for the enactment of this legislation was the prevention of venereal disease, and showed that the legislators intended that this legislation, in part, was directed against massage parlor operators (Tr. 1/3/79, p. 29).

Counsel thereupon sought leave to file supplemental briefs addressing the issues, which the trial court allowed (Tr. 1/3/79, p. 35), and the initially granted temporary restraining order was ordered to continue in effect until January 9, 1979 and pending the court's decision on the motion for an injunction (Tr. 1/3/79, p. 59).

REASONS FOR GRANTING THE WRIT

1. Introduction.

Petitioners are in this Petition attacking those provisions of the Missouri Statutes which prohibit "sexual contact" for something of value, *i.e.*, §§567.010(4)(b) and (5) and related provisions of these Statutes punishing and making criminal such acts. They are not asking that Chapter 567 as it relates to "sexual intercourse" and "deviate sexual intercourse" for "something of value" be declared unconstitutional. §§567.010(4)(a), (b) and (5).

1(a). Equal Protection Violations.

The provisions of Chapter 567, R.S.Mo., relating to "sexual contact" for hire do in fact violate the Equal Protection Clause of the Fourteenth Amendment as follows: (1) the Statute permits sexual touching for those who do not pay, but does provide criminal penalties for those who pay; (2) the Statute provides for unequal punishment for those who "patronize prostitution" or for those committing crimes of prostitution, as opposed to those who "promote prostitution"; (3) the Statute provides for the same penalties for those engaged in "sexual intercourse" and "deviate sexual intercourse", as for those who engage in "sexual contact"; (4) the Statute prohibits the touching of the "genitals" (defined in Webster's Dictionary as meaning the "reproductive organs"), *i.e.*, the

touching of the penis and vaginal areas; this leaves as no violation of the law such activities as sado-masochism, bondage, sexual acts with animals or corpses, adultery, fornication, peeping, touching of the female breast, of the thighs, and the like; See Richardson, "Sexual Offenses Under the Proposed Missouri Criminal Code", 38 Mo.L.Rev. 371 (1973), at p. 378; (It is to be noted further that under Section 566.110 of the Missouri Statutes, sexual contact between consenting persons is not a violation of the law, except "when the other person is incapacitated or 12 or 13 years old"; it is also interesting to note that Chapter 566 prohibits the touching of the breast of any female person whereas under Chapter 567, same is not prohibited.); (5) the Statute unconstitutionally distinguishes between activities undertaken for money or property of value and those which may be undertaken in exchange for other services which are also of value; and (6) the Statute arbitrarily distinguishes between operations involving one prostitute and operations involving more than one prostitute. In *Hogge v. Hedrick*, 391 F.Supp. 91 (E.D.Va. 1975), the court there held that the plaintiffs were entitled to a preliminary injunction against a sexual touching ordinance under an equal protection analysis because "the touching or exposing of specific body parts, may indeed be underinclusive in character and without a rational basis." See also, for an equal protection analysis, *In re P.*, 400 N.Y. Supp.2d 455 (Fam. Ct. 1977); *Cheek v. City of Charlotte*, 180 S.E.2d 18 (N.C. 1968); *Valley Health Systems, Inc. v. City of Racine*, 369 F.Supp. 97 (E.D. Wisc. 1973); *Hart Health Studio v. Salt Lake County*, 577 P.2d 116 (Utah 1978); *People v. Williams*, 286 N.Y.S.2d 575 (1967), which held that a New York statute defining solicitation for prostitution was void on equal protection grounds, and to like effect is *State of Ohio v. Faulk*, No. C-77486, First Appellate District of Ohio (unreported), a copy of which

was attached to Petitioners' Brief in the Eighth Circuit as Exhibit C; *People of the State of New York v. Johnson*, 355 N.Y.S.2d 266, 267-268 (1974); *People of the State of New York v. Rice*, 363 N.Y.S.2d 484, 487-48 (1975) (striking down state sodomy law on equal protection grounds for discriminating between married and unmarried persons). Compare *State v. Saunders*, 381 A.2d 333 (N.J. 1977) commented upon: "The Constitutional Right of Sexual Privacy," 12 Suffolk, Va.L.Rev. at pp. 1312-1328.

Petitioners showed that there was no rational basis, compelling state interest, or an appropriate governmental interest suitably furthered by the differential treatment set out above.[2]

Thus Petitioners conclusively showed that the drafters of the Statute, as well as the Missouri Legislature, only had one purpose in mind in enacting Chapter 567.010(c) prohibiting sexual contact, namely the purpose of preventing venereal disease (See Professor Hunvald's affidavit, with Comments of the drafters of the Code attached thereto, Tr. pp. 7-8; Exhibit 1). Also attached to Professor Hunvald's affidavit were arguments in favor of legalization of prostitution, contained in the Comments to the Modern Penal Code, at pp. 171-173. The arguments in favor of prostitution were summarized as follows (citing many authorities): (1) prostitution cannot be eliminated by law; (2) sumptuary laws that cannot be generally enforced lend themselves to extortion and arbitrary and episodic prosecution; (3) failure to provide a professional outlet for male sexuality results in more rape and other sexual crimes; (4) registration and periodic health inspection are the best means for controlling venereal disease; disease is much more likely to be spread by the promiscuous amateur than by

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2. See discussion, *infra*.

professional prostitutes concerned and instructed to avoid infection; (5) legalized prostitution offers less opportunity for official corruption and an unrealistic effort of total repression; (6) by confining prostitution, particularly in neighborhoods, police surveillance is facilitated and the safety of the general community is promoted (Tr. pp. 7-8; Exhibit 1). The affidavit of Kenneth Elliott, as acknowledged by the court below, certainly casts doubt on any finding that sexual touching involved the spread of venereal disease (Tr. pp. 23-25; Exhibit 3). The testimony of Mr. Cylar, a Public Health official, certainly put to rest the notion that venereal disease by sexual touching presented any health problem (Tr. pp. 13-16). Both Dr. Elliott's and Dr. Colom's affidavits showed that masturbation has beneficial effects, was widespread amongst American males, had no deterimental effects, and was in certain circumstances used by medical practitioners (Tr. pp. 23-25; Exhibits 2, 3 & 4). The testimony of the State Legislature showed that the only possible reason advanced to the legislature for enactment of the law was the prevention of venereal disease. The lower court, in its Memorandum Opinion, acknowledged that Petitioners had made a substantial showing in this regard (See Appendix B, pp. A21-A23).

However, the trial court stated that there might have been other reasons that the Missouri Legislature enacted Chapter 567 (which reasons and facts, it is respectfully suggested, were never presented to the Missouri Legislature). According to the lower court in its Memorandum Opinion, the Legislature *might* have enacted the Statute for the following reasons: "(1) the strain public marketing of sex may place on the institution of marriage, (2) the possibility that innocent citizens may be confronted by unwanted solicitation, and (3) the State's concern over regulating the criminal manipulation that may surround the ac-

tivity of prostitution." (Appendix B, pp. A22-A23). In this respect, the Petitioners made available to the court the case of *In re T.*, the finding of which the lower court chose to disregard (See Appendix B, p. A22). In *In re P.*, citing numerous authorities, the court held that the prevailing evidence shows that prostitution does not harm the family or marriage (at p. 468), does not serve any objective such as deterring organized crime (at p. 467), and does not present any offense to public sensitivities (at pp. 468-469). *In re P.*, 400 N.Y.Supp.2d 455 (1977). (This case was presented to the court by way of attachment to Petitioners' Suggestions in Support of their Motion for Preliminary Injunction.) Thus, the Petitioners made a showing that there was a possibility that they would succeed on their merits concerning the propriety of Chapter 567, and also showed that there were sufficiently serious questions going to the merits to make them a fair ground of litigation with respect to the propriety of Chapter 567. It is also to be noted that the State may not "rely upon the bare assertion of immorality to justify a criminal prohibition." *In re P.*, at p. 467, citing many authorities. This view was echoed by one of the drafters of the Code, Judge Orville Richardson. See "Sexual Offenses" under the proposed Missouri Criminal Code, 38 Mo.L.Rev. 371 (1973), at pp. 373-4, and particularly footnote 6, wherein the author states (in footnote 6 at p. 374): "All arguments seem to weigh most heavily against the legal enforcement of morality."

In short, there was no evidence showing that there was any "public interest" requiring the prohibition of "sexual touching", nor any showing that masturbatory conduct by a person injuriously affects others, nor any showing that the "means (were) reasonably necessary for the accomplishment of the purpose, and not unduly oppressive."

Finally, there was no showing that the least restrictive means necessary were used to accomplish the purpose. All of the evidence, in fact, was to the contrary.

1(b). Fundamental Rights of Petitioners Were Infringed Upon by Chapter 567, R.S.Mo.

(1) *The Petitioners' rights to employment, to do business, and to obtain income both from the ownership of property and from conducting business are fundamental rights.*

As the lower court correctly held, "the Supreme Court has recognized: 'the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment.'" *Greene v. McElroy,* 360 U.S. 474, 3 L.Ed.2d 1377 (1959). See also *Nyberg v. City of Virginia,* 495 F.2d 1342 (8th Cir. 1975), appeal dismissed, 419 U.S. 891 (1976). The Fifth Amendment mandate applies with equal force to the states via the Fourteenth Amendment due process clause, and there is no difference in the depth of the protection afforded to persons as between the Fifth Amendment's application federally, and the Fourteenth Amendment's application to and against the State. *Paul v. Davis,* 424 U.S. 693, 702 (F.N. 3) (1976); *Mason v. Claytor,* 459 F.Supp. 174, 179 (D. D.C. 1978).

Each Petitioner in this matter established by way of verified petition that they had a going business requiring a substantial investment. Their businesses were, as noted above, certainly legal prior to January 1, 1979 when Chapter 567 took effect. Petitioners established they were taxed, inspected and otherwise examined by the Defendants, their officers, agents and employees. It was established by Professor Hunvald in his affidavit that at least

one amendment to Chapter 567 was specifically directed against massage parlors (Tr. pp. 7-8, Exhibit 1).

Given Petitioners' fundamental right to property and to enjoy the fruits thereof,[3] the Respondents failed to show any "compelling state interest", rational basis, or an appropriate governmental interest suitably furthered by the differential treatment so as to justify the provisions of Chapter 567, R.S.Mo. 1969, as it relates to "sexual touching". Petitioners therefore were entitled to a preliminary injunction in this regard. See *Corey v. City of Dallas,* 352 F.Supp. 977 (N.D. Tex. 1972); *Sax v. Breier,* 384 F.Supp. 36 (E.D. Wis. 1974); *City and County of Denver v. Wilson,* 572 P.2d 484 (Col. Banc 1977); *JSK Enterprises v. Lacey,* 492 P.2d 600 (Wash. 1972); *Cianciola v. Members of City Council, Knoxville, Tenn.,* 376 F.Supp. 719 (E.D. Tenn. 1974); *Jensen v. Salt Lake,* 530 P.2d 3 (Utah 1974).

(2) *Petitioners' Rights to Freedom of Speech to Freely Associate, and to Privacy, Are Fundamental Rights Affected by Chapter 567 of the Missouri Statutes.*

(a) *The Right of Free Speech.* Section 567.010(3)(c) and Section 567.010(1)(d) prohibit solicitation to engage in sexual conduct. It is respectfully suggested that these provisions violate Petitioners' right to free speech. The Supreme Court of the United States has consistently held that, regardless of taste, tradition, or common acceptance, free speech is protected unless it falls into the category of "fighting words". See *Gooding v. Wilson,* 405 U.S. 518 (1971). And, free speech does not lose its First Amend-

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3. It is also clear that Chapter 567, R.S.Mo., constitutes a violation of Petitioners' Freedom to Contract (see Article I, Section 10, U. S. Constitution) and, further, is an *ex post facto* law aimed at Petitioners' businesses (Article I, Section 9, Clause 3, U. S. Constitution).

ment protection because of its commercial aspects. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 818-821 (1975). This Court has made it abundantly clear that a criminal statute capable of punishing spoken words could not stand constitutional muster unless it has been authoritatively construed by state courts to be inapplicable to speech which is protected by the First and Fourteenth Amendments. See *Lewis v. New Orleans*, 415 U.S. 130 (1974). The statute in this case which sweeps as broadly as it does is on its face therefore plainly unconstitutional. See Note, "The First Amendment Overbreadth Doctrine," 83 Harv.L.Rev. 844 (1970).

(b) *The Right of Privacy.* This Court has held that there is a constitutional right to "privacy". See *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* made clear that the right of privacy was implicit within the First Amendment Freedom of Association, within the First Amendment Freedom of Speech, within the Fourth Amendment restraint on search and seizure, within the Ninth Amendment's unenumerated rights, within the Fourteenth Amendment Equal Protection guarantee, within the Fourteenth Amendment Due Process Guarantee, and within the penumbra of the Bill of Rights. It is suggested that such right of privacy also resides within the First Amendment Freedom of Religion and within the Fifth Amendment restraint on self-incrimination. It has been held that the right of "privacy" includes the right of sexual privacy. See *In re P.*, cited *supra*, citing many authorities; *State v. Saunders*, cited *supra*. See also *Fagden v. Linker*, 365 A.2d 1947 (Pa. 1976); *Wyman v. Wallace*, 549 P.2d 71 (1976) (acts with non-spousal partners); *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976) (acts of oral-sexual

expression between heterosexuals); and the right to possess obscene material in the privacy of one's home, *Stanley v. Georgia*, 394 U.S. 557 (1969). See also *State of Iowa v. Pilcher*, 249 N.W.2d 348, 359 (Ia. 1976); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 480-481 (Mass. 1974); *State of N.J. v. Lair*, 301 A.2d 748, 753 (N.J. 1973); *Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968); *Buchanan v. Batcheler*, 308 F.Supp. 729 (N.D. Tex. 1970), vacated and remanded on other grounds, 401 U.S. 989 (1971). These cases all hold that sexual relations which are private and consensual in nature are within the constitutional right of privacy. It is to be noted that, in the instant case, the sexual act of touching was, according to Petitioners' Complaint, to take place in the privacy of a room in an area of Petitioners' businesses. Thus, the privacy of the home is also involved in this matter. See *U. S. v. Orito*, 413 U.S. 139, 142 (1973), wherein the court held that the "Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those . . . procreation . . . ." *Contra, Caesar's Club v. St. Louis County*, 565 S.W.2d 783 (Mo.App. 1978). See also Discussion at pp. A18-A19 of the Trial Court's "Opinion" in this cause.

Thus, since Petitioners have the protected rights as enumerated above, and since there was no showing of a compelling state interest, or rational basis or appropriate governmental interest suitably furthered by the differential treatment[4] in this case, Petitioners were entitled to their preliminary injunction.

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4. See discussion, *infra*.

DISCUSSION OF QUESTION PRESENTED

Traditionally, the courts have applied a two-tiered analysis to decide questions under the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution. The court in *Corey v. City of Dallas*, cited *supra*, reversed on other grounds, 492 F.2d 496 (5th Cir. 1974), stated:

> "The Equal Protection Clause does not deny to a state or local government the power to treat different classes of persons in different ways in the area of public health, safety and morality. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). However, governmental bodies are denied the power to legislate persons into different classifications when the classifications are unrelated to the objective of the legislation. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1968); *Railway Express Agency v. New York*, 336 U.S. 106, 66 S.Ct. 463, 93 L.Ed. 533 (1949); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920).
>
> "Where a challenge based upon classification is made to a state or local law under the Equal Protection Clause a court is required to consider 'the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.' *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969); *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).
>
> "There are two standards which are applicable in evaluating a classification by law which is challenged under the Equal Protection Clause.

> "A. Rational Basis Standard
>
> "If a classification does not affect a 'fundamental right,' its constitutionality is to be judged on the basis of whether the distinction drawn by the law has some *rational basis* to a legitimate governmental interest. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). In *McGowan* the Supreme Court held that the Equal Protection Clause 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective' and that 'a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify, it.' 366 U.S. at 425, 426, 81 S.Ct. at 1105. Further, the Court held that there is a presumption of constitutionality of the law where a rational basis for classification conceivably exists even though there is a resulting inequality.
>
> "B. Compelling State Interest Standard
>
> "On the other hand, if a classification does affect a 'fundamental right,' its constitutionality is to be judged on the basis of whether the classification is necessary to promote a *compelling state interest*. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).
>
> * * *
>
> "In order for legislation affecting a fundamental right to withstand a challenge under the Equal Protection Clause, it is incumbent on the governmental authorities to show that there was no other practical matter

in which the objective of the legislation could be accomplished and that the interest of the governmental authority is superior to the rights of the persons who may be adversely affected by the legislation." At pp. 979-980.

This two-tiered analysis has been criticized. The first part of the test - whether there is a "rational basis" for the legislation in question - has proved in practice to be "minimal scrutiny in theory and none in fact." Gunther, The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972), 86 Harv.L.Rev. 1, 8. The second part of the test - the "strict scrutiny" standard, or "compelling state interest" test, has been characterized as "strict in theory and fatal in fact." Gunther, op. cit., at p. 8.

The learned Justice of the Supreme Court of California, Stanley Mock, has brilliantly summarized the existing state of affairs in *Hawkins v. Superior Court*, 586 P.2d 916 (Cal. 1978), at pp. 924-926:

> "The two-tier system of reviewing equal protection claims has been criticized by many thoughtful observers as a rigid and artificial analytical structure. Leading the assault has been Justice Thurgood Marshall, who has characterized the two-tier mode of analysis as 'outdated and intellectually disingenuous.' (*Beal v. Doe* (1977) 432 U.S. 438, 457, 97 S.Ct. 2366, 53 L.Ed.2d 464 (dis. opn.).) Justice Marshall summarized his consistently expressed views in a dissent to the court's opinion in *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 98-99, 93 S.Ct. 1278, 1330, 36 L.Ed.2d 16: 'I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See *Dandridge v. Williams*, 397 U.S. 471, 519-521, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (dissenting opinion); *Richardson v. Belcher*, 404 U.S. 78, 90, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971) (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.' (See also *Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 318-321, 96 S.Ct. 2562, 49 L.Ed.2d 520 (dis. opn. by Marshall, J.).) And Justice Marshall set forth his perception of the proper inquiry in his majority opinion, signed by six other justices, in *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212: 'As in all equal protection cases . . . the crucial question is whether there is an *appropriate governmental interest suitably furthered* by the differential treatment.' (Italics added.)

Other judges and commentators have endorsed the view that the traditional framework for equal protection analysis is deficient in concept and frequently ignored in practice. Justice White did so explicitly in *Vlandis v. Kline* (1973) 412 U.S. 441, 458-459, 93 S.Ct.

2230, 37 L.Ed.2d 63 (conc. opn.), and Justice Powell implicitly with his conspicuous avoidance of two-tier rhetoric in *Weber v. Aetna Casualty & Surety Co.* (1972) 406 U.S. 164, 172-173, 92 S.Ct. 1400, 31 L.Ed.2d 768. (See also Gunther, supra; Bennett, *Liberty, Equality, and Welfare Reform* (1973) 68 Nw.L.Rev. 74, 96; Gellhorn & Hornby, *op. cit. supra,* 60 Va.L.Rev. at pp. 986-988; Karst, *The Supreme Court, 1976 Term —Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 3; *Francis v. Cleland* (D.S.D.1977) 433 F.Supp. 605, 618-619; *Hoover v. Meiklejohn* (D.Colo.1977) 430 F.Supp. 164, 167-168; *Gilpin v. Kansas State High School Activities Assn., Inc.* (D.Kan.1974) 377 F.Supp. 1233, 1238-1239; *McIlvaine v. Pennsylvania State Police* (1973), 454 Pa. 129, 309 A.2d 801, 807-811 (dis. opn.); *Schwartz v. Talmo* (1973), 295 Minn. 356, 205 N.W.2d 318, 324-325 (dis. opn.).)

In short, the vice of the traditional approach is that it applies either a standard that is virtually always met or one that is almost never satisfied. Professor Wilkinson observed that the attempt to apply 'two widely variant levels of scrutiny with no gradations for rights of intermediate importance' must prove unsatisfactory 'because, as Professor Freund once remarked, the world does not move on a "binary principle."' (Wilkinson, supra, at p. 948, fn. 15.)

The broad analytical lacuna thus remaining would be filled if Justice Marshall's intermediate approach were adopted; it has not yet gained widespread acceptance, however, no doubt because of a hesitance to develop an unstructured standard that might appear to invite judicial intervention in policymaking preferably left to political agencies. But any court that

is so inclined can perform simple legal legerdemain and reach a predetermined result by maneuvering such conclusory labels as 'suspect' or 'fundamental.' Even the most responsible application of the traditional analysis inevitably involves a certain measure of judicial balancing, for the scope of such terms as 'rational,' 'legitimate,' 'compelling,' or 'necessary' remains largely a matter of opinion. The tendency of courts to manipulate words and meanings to avoid the rigidity of the two-tier framework has prompted one commentator to write: 'Working with due process and equal protection opinions dealing with fundamental rights is like playing [the croquet match in *Alice in Wonderland*] . . ., using concepts that bend or fall limp to chase words that move with a mind of their own into categories which just are not there any more. We quickly learn: this is not the game we thought we were playing.' (Goodpaster, supra, at 479.)

In recent cases, the United States Supreme Court has apparently developed an intermediate level of review in response to 'a perception that the all-or-nothing choice between minimum rationality and strict scrutiny ill-suits the broad range of situations arising under the equal protection clause, many of which are best dealt with neither through the virtual rubber-stamp of truly minimal review nor through the virtual death-blow of truly strict scrutiny, but through methods more sensitive to risks of injustice than the former and yet less blind to the needs of governmental flexibility than the latter.' (Tribe, American Constitutional Law (1978) p. 1089 (hereinafter Tribe).) That equal protection standards are in a state of flux—and that a third standard of review is emerging—has been widely recognized. (See, e. g., *Acha v. Beame* (S.D.N.Y.1977) 438 F.Supp. 70, 78; *Gay Students Org. of U. of New Hamp-*

shire v. Bonner (D.N.H.1974) 367 F.Supp. 1088, 1096-1097, affd. and mod. (1st Cir. 1974) 509 F.2d 652; Tribe, supra, at pp. 1082-1092; Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause* (1977) 29 Stan.L.Rev. 663, 665-666; Wilkinson, supra, at pp. 951-953; Goodpaster, supra, at pp. 501-504; Ackerman, *op. cit. supra,* 125 U.Pa.L.Rev, at pp. 774-775; Karst, *op. cit. supra,* 91 Harv.L.Rev. at p. 23, fn. 122; Note, *A Question of Balance, Statutory Classifications Under the Equal Protection Clause* (1973) 26 Stan.L.Rev. 155, 157-160; Note, *The Supreme Court of California, 1972-1973* (1974) 62 Cal.L.Rev. 408, 462.)

The new standard, thus far most closely associated with discrimination based on classifications by gender or the status of illegitimacy, was clearly articulated in *Craig v. Boren* (1976) 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397: 'To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' The vitality of 'middle-level scrutiny' was subsequently confirmed when this language was quoted and the new standard applied in *Califano v. Goldfarb* (1977) 430 U.S. 199, 210-211, 97 S.Ct. 1021, 51 L.Ed.2d 270, and *Califano v. Webster* (1977) 430 U.S. 313, 316-317,[1] 97 S.Ct. 1192, 51 L.Ed.2d 360.

Justice Marshall's opinion for the court in *Zablocki v. Redhail* (1978) 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, indicates the new intermediate mode of review may be more generally applied. The equal

1. Several lower federal courts have also quoted and applied this test in cases involving gender-based discrimination. (*E.E.O.C. v. American Tel. & Tel. Co.* (3d Cir. 1977) 556 F.2d 167, 179; *Blake v. City of Los Angeles* (C.D.Cal. 1977) 435 F.Supp. 55, 60; *Hoover v. Meikeljohn* (D.Colo. 1977) supra, 430 F.Supp. 164, 168; *In re Paris Air Crash of March 3, 1974* (C.D.Cal.1977) 427 F.Supp. 701, 708.)

protection analysis there presented carefully avoided the two tiers of traditional review and focused instead on such factors as the importance of the rights involved, the extent to which the classification at issue interfered with their exercise, and the significance of the state interests advanced in support of the classification. The court concluded that the statutory classification could not 'be justified by the interests advanced in support of it.' (*Id.* 434 U.S. 451, at p. 391, 98 S.Ct. at p. 683.) Several other Supreme Court justices have accorded explicit recognition to the development of an intermediate level of review. In his dissenting opinion in *Craig v. Boren* (1976) supra, 429 U.S. 190, 218, 97 S.Ct. 451, Justice Rehnquist observed that the court was applying an 'elevated or "intermediate" level scrutiny.' Concurring in *Craig,* Justice Powell remark that the court subjects gender-based classifications to 'a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present.' (*Id.* at p. 210, 97 S.Ct. at p. 464; see also *id.* at pp. 211-214, 97 S.Ct. 451 (conc. opn. by Stevens, J.).) Dissenting in *Moore v. East Cleveland* (1977) 431 U.S. 494, 551, 97 S.Ct. 1932, 1962, 52 L.Ed.2d 531, Justice White catalogued the *three* levels of review: strict scrutiny, 'the somewhat less strict standard of *Craig v. Boren,*' and 'the generally applicable standard' (the rational basis test).[2]

2. Many lower courts have also recognized explicitly that equal protection analysis now entails three levels of review. For instance, in *Hoover v. Meiklejohn* (D.Colo.1977) supra, 430 F.Supp. 164, 168, the court understood the standard enunciated in *Craig* to constitute 'a "middle-tier approach," requiring something between "legitimate" and "compelling," viz., "important," and something more than a "rational" relationship but less perhaps than "strict scrutiny," viz., "substantially" related.' (See *Meloon v.*

(Continued on Following Page)

As the foregoing discussion indicates, this Court has never explicitly stated when courts should employ the so-called "medium-level" of review, e.g., when fundamental rights are involved or when they are not, only when racial or gender based classifications are involved, *Orr v. Orr*, 99 S.Ct. 1102 (1979); *Parham v. Hughes*, 99 S.Ct. 1742 (1979), or in all cases, *Vance v. Bradley*, 99 S.Ct. 939 (1979) (age discrimination). This Court should grant certiorari to decide this important question.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit should be granted, the judgment of the Court of Appeals vacated with instructions to grant Petitioners' preliminary injunction or to reconsider its opinion in light of the proper test for resolving Equal Protection questions, and for such other and further relief as the Court deems just and proper in the premises.

Respectfully submitted,

JAMES R. WYRSCH
Attorney for Petitioners

Footnote Continued—

Helgemoe (D.N.H.1977) 436 F.Supp. 528, 530-532; *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, 604-605; *Vance v. United States* (N.D.Tex.1977) supra, 434 F.Supp. 826, 833-834, affd. *per curiam* (5th Cir. 1977) 565 F.2d 1214; *Lewis v. Cohen* (E.D.Pa.1976) 417 F.Supp. 1047, 1053; *Gilpin v. Kansas State High School Activities Assn., Inc.* (D.Kan.1974) supra, 377 F.Supp. 1233, 1238-1239; see also Note, *The Supreme Court, 1976 Term* (1977) 91 Harv.L.Rev. 70, 177-182; Note, *Gender-Based Legislative Classifications* (1978) 57 Nev.L.Rev. 555, 559.) In *Francis v. Cleland* (D.S.D.1977) supra, 433 F.Supp. 605, 618-620, the court noted that the new 'medium level of review' has been applied in cases involving classifications which, though not suspect, came close to being suspect; the court concluded that such a middle-tier approach is likewise appropriate when a case involves a right not fundamental but which is close to being fundamental."

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1079

J.B.K., Inc., etc., et al.,
Appellants,

v.

Norman Caron, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

Submitted: April 24, 1979
Filed: June 14, 1979

Before LAY, BRIGHT and ROSS, Circuit Judges.

ROSS, Circuit Judge.

Appellants, massage parlor operators in Missouri, sought a preliminary injunction to prevent state and local law enforcement personnel from enforcing Chapter 567, Revised Statutes of Missouri, MO. REV. STAT. §§ 567.010-567.100, which became effective January 1, 1979. Chapter

567 prohibits prostitution, which MO. REV. STAT. § 567.010 (2) defines as follows:

> "Prostitution", a person commits "prostitution" if he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person.

Terms such as "sexual conduct" and "something of value" are subsequently defined.

Appellants' business activities include genital massage for payment which would come within the statutory definition of prostitution. *See* MO. REV. STAT. §§ 567.010(2) and (4)(c). They contend that the prohibition of this activity violates their rights to freedom of speech, freedom of association, privacy, due process, equal protection, freedom of contract and employment. They also allege a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

The district court[1] denied the requested preliminary injunction primarily because he considered that appellants had not established a probability of success on the merits of any of these claims. We hold that the denial of the preliminary injunction was not an abuse of discretion, and we affirm on the basis of the district court's comprehensive opinion. In addition, we make the following observations.

Appellants' right to privacy claim rests on their mistaken premise that the constitutionally protected right to privacy encompasses *all* sexual acts performed by consenting adults in nonpublic places. We do not agree that the right to privacy extends to all sexual practices per-

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

formed in private including the commercialized sexual activities regulated in this case. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973).

As stated in that case:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' * * * This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.
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> * * *
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> Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take.
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> * * *
>
> The state statute books are replete with constitutionally unchallenged laws against *prostitution,* suicide, voluntary self-mutilation, brutalizing "bare fist" prize fights, and duels, although these crimes may only directly involve "consenting adults." Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision.

Id. at 65, 68 and 68 n.15 (citations omitted, emphasis added).[2]

With regard to plaintiff's freedom of speech claim, *see Davis v. Norman,* 555 F.2d 189 (8th Cir. 1977). When, as in this case, a state or local law primarily regulates conduct, any incidental impact on speech is to be judged in the following light:

> The Supreme Court has held that:
>
> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.

Id. at 190-91 quoting from *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968). *See also Paris Adult Theatre I v. Slaton, supra,* 413 U.S. at 67:

> Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by *Stanley,* or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human

2. *See also Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976) in which the Supreme Court summarily affirmed a three-judge court decision upholding the constitutionality of a Virginia sodomy statute against a right to privacy challenge. The statute prohibited sodomy even when practiced by consenting adults in private.

> "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests.

We do not agree with appellants' contention that Chapter 567 is unconstitutionally vague. A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" or if it "encourages arbitrary and erratic arrests and convictions." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). We find that the statute is precisely worded, that its terms are sufficiently defined and that it gives "fair notice of the offending conduct." *Id.*

We note that the United States Supreme Court denied certiorari in *Caesar's Health Club v. St. Louis County,* 565 S.W.2d 783 (Mo. App.), *cert. denied,* 47 U.S.L.W. 3317 (U.S. Nov. 7, 1978), in which the Missouri Court of Appeals upheld a county ordinance virtually identical to Chapter 567. The Missouri court found that no fundamental rights were infringed by the ordinance, that the law was a reasonable and legitimate exercise of police power and that it was not overbroad.

Challenges to other laws regulating or prohibiting massage parlor practices have met a similar fate. *See, e.g., Tomlinson v. Mayor and Aldermen of The City of Savannah,* 543 F.2d 570 (5th Cir. 1976);[3] *Brown v. Brannon,*

3. In *Tomlinson v. Mayor and Aldermen of The City of Savannah,* 543 F.2d 570 (5th Cir. 1976), the Fifth Circuit refused to enjoin enforcement of an ordinance "that prohibits heterosexual massages, imposes strict training and certification requirements on massagists, and puts rather onerous place and manner restrictions on the giving of massages" against challenges to the law as "an arbitrary restriction of a supposedly due process-protected right to operate a legitimate business, and as a violation of equal protection * * *." *Id.* at 571. The court stated:

(Continued on Following Page)

399 F.Supp. 113 (M.D. N.C. 1975), *aff'd*, 535 F.2d 1249 (4th Cir. 1976).

We have considered appellants' remaining equal protection, right to employment and Title VII issues and find that they do not warrant preliminary injunctive relief.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Footnote Continued—

In *Smith v. Keater*, 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974), *dismissing for want of a substantial federal question*, 285 N.C. 530, 206 S.E.2d 203; *Rubenstein v. Cherry Hill*, 417 U.S. 963, 94 S.Ct. 3165, 41 L.Ed.2d 1136 (1974), *dismissing for want of a substantial federal question*, No. 10,027 (N.J. Sup. Ct. Jan. 29, 1974); and *Kisley v. City of Falls Church*, 409 U.S. 907, 93 S.Ct. 237, 34 L.Ed.2d 169 (1972), *dismissing for want of a substantial federal question*, 212 Va. 693, 187 S.E.2d 168 (1972), the Supreme Court dismissed appeals from state court decisions upholding the constitutionality of ordinances prohibiting heterosexual massages. Appellants in those three cases contended in the Supreme Court that the ordinances established invidiously discriminatory sex-based classifications in violation of the equal protection clause, worked an unreasonable abridgement of the right to pursue a legitimate livelihood; and created an unconstitutional irrebuttable presumption that all massages lead to illicit sexual behavior. The Supreme Court ruled that these challenges did not raise a substantial constitutional question.

Id. See also Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978), upholding a San Antonio, Texas massage parlor ordinance as a valid exercise of police power against charges that due process, equal protection and employment interests were unconstitutionally invaded.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 78-1007-CV-W-3

J.B.K., INC., et al.,
Plaintiffs,

vs.

NORMAN CARON, et al.,
Defendants.

MEMORANDUM OPINION

(Filed January 12, 1979)

Several threshold jurisdictional questions have been raised by the defendants concerning the propriety of this Court considering the federal constitutional issues involved in ruling on plaintiffs' application for a preliminary injunction prohibiting the defendants from enforcing particular provisions of Chapter 567 R.S. Mo. (1979).

CASE OR CONTROVERSY ISSUE

Defendants deny the existence of a case or controversy as required by Article III of the U.S. Constitution and the Declaratory Judgments Act, 28 U.S.C. §2201. The case or controversy requirement is jurisdictional and if this requirement is not met the federal court may not entertain the complaint. A case or controversy arises with-

in the meaning of the constitution when a question respecting the constitution, treaties or laws of the United States have assumed such a form that the judicial power is capable of acting on it. *In Re Summers,* 325 U.S. 561, 89 L.Ed. 1795, 1800 (1945). While the case or controversy requirement can also involve the question of standing, i.e. does a litigant have a personal stake in the outcome of the case; this aspect of the case or controversy requirement is not at issue in the above action. The issue before the Court is whether plaintiffs have sustained or are in immediate danger of sustaining some direct injury. That injury or threat of injury must be both real and immediate and not hypothetical nor conjectural. Abstract injury clearly is not sufficient to meet the Article III requirement. See *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674, 682 (1974).

In *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), the Supreme Court found that where threats of prosecution against petitioner existed that could not be characterized as imaginary or speculative, it was not necessary:

> that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. *Steffel,* supra at 514.

In *Blaknik Co. v. Ketola, et al.,* No. 78-1151 (8th Cir., Nov. 13, 1978) plaintiffs were seeking declaratory and injunctive relief against enforcement of a city ordinance regulating certain conduct on premises holding a liquor license. The Eighth Circuit in evaluating whether the case or controversy requirement had been satisfied determined that because the ordinance clearly applied to plaintiffs' business and because a challenger to a statute need not expose himself to actual arrest, the case or controversy requirement was satisfied.

In the instant case, plaintiffs allege that various officials threatened to institute action against them on January 1, 1979 when Chapter 567 R.S. Mo. became effective. From the brief legislative history before the Court, it appears that particular provisions of Chapter 567 were aimed at making illegal certain massage parlor practices. (Rep. O'Toole and Sen. Cassky's testimony as stipulated to and presented to the Court.)

The Court finds that particular provisions of the new act seem clearly directed towards prohibiting particular conduct that the massage parlors in their pleadings have admitted is a routine part of their business. This coupled with allegations concerning threats by law enforcement officers made at least to some of the St. Louis plaintiffs is sufficient to satisfy the case or controversy requirement. Therefore, the defendants' motion to dismiss for failure to satisfy the case or controversy requirement must be denied.

ABSTENTION ISSUE

The defendants also argue that this Court should abstain from considering the issues involved in this case on either of the following two abstention theories:

> (1) the case presents unresolved issues of state law which should be decided in the state tribunals; or,
>
> (2) the federal court should not interfere with state criminal prosecutions as dictated by *Younger v. Harris,* 401 U.S. 37, 46, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The Supreme Court has recognized that the proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in

state tribunals. *City of Meridian v. Southern Bell Telephone and Telegraph Co.*, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562 (1959); *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 85 L.Ed. 971 (1941). Abstention on this ground is not indicated if the state law is clear on its face or if its meaning has been authoritatively decided by the state court. Wright, Miller and Cooper, 17 Federal Practice and Procedure, §4242 (1978).

After careful review of the sections of Chapter 567 R.S. Mo. challenged by plaintiff, the Court finds that the language of the act is not so unclear as to require the state courts to initially interpret its meaning nor does it involve unsettled questions of state law whose resolution may obviate the need for deciding federal constitutional issues.[1]

While there has been no state court decision on this particular statute, the St. Louis Court of Appeals previously considered state and federal constitutional challenges to a St. Louis ordinance containing provisions nearly identical to the provisions of §567.010(2), (4)(a), (b) and (c), and (5). *Caesar's Health Club v. St. Louis County*, 565 S.W.2d 783 (Mo. App. 1978). In that case the court refused to declare the statute vague or overbroad declaring:

> the alleged overbreadth of the ordinance is neither real nor substantial. Moreover, because possible invalid applications of the ordinance are highly speculative and not presently before this court, we believe the ordinance should stand 'until an actual case corrobo-

1. Abstention may be appropriate where there is a fair possibility that the statute may violate the state constitution if the interpretation of some specialized state constitutional provision is required. However, absention is not appropriate where the statute may be subject to a state constitutional challenge under a state provision substantially similar to the federal provision that is the basis of the federal challenge. Wright, Miller & Cooper, supra, §4242.

> rates and justifies [appellants] claim of anticipated harm and unconstitutional application' . . . The ordinance should not be declared overbroad on the basis of frivolous and speculative invalid applications where a limiting instruction can reasonably be placed on it. *Caesar's Health Club*, supra at 789.

While the Court recognizes this is not a binding decision nor a decision dealing with the precise statute in question here, that opinion further supports this Court's belief that the language of this state statute is not so unclear that a state interpretation of that statute is necessary before this Court can reach the federal constitutional issues presented by plaintiffs' complaint.

The defendants also suggest that the doctrine enunciated by the Supreme Court in *Younger v. Harris*, supra, dictates that this Court abstain in this case. In *Younger*, the Court ruled that in the absence of exceptional circumstances creating a threat of irreparable injury both immediate and great and amounting almost to bad faith harrassment, a federal court should not enjoin an ongoing state criminal prosecution. While the Court in *Younger* examined considerations of equity and comity that prevented federal interference with state criminal prosecutions, in later decisions the Supreme Court determined that these considerations were inapplicable where state criminal proceedings were merely *threatened* but not pending. In *Steffel v. Thompson*, supra, the Court determined that a declaratory judgment was not precluded where state criminal prosecutions were only threatened. The rationale of *Steffel* was extended in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) where the court upheld the granting of a preliminary injunction where a state criminal statute was challenged and plain-

tiffs were not subject to criminal prosecutions in the state court at the time the injunction was issued.

The *Steffel* and *Doran* decisions indicate that abstention on the basis of *Younger v. Harris* would be inappropriate in this case since no state prosecution is presently pending.

Because the Court can find no theory under which abstention would be appropriate given the facts and circumstances of this case, defendants' motion requesting the Court to invoke the abstention doctrine is denied.

PRELIMINARY INJUNCTION ISSUE

A preliminary injunction may be issued only if the moving party can satisfy either of the following requirements:

> (1) probable success on the merits and possible irreparable injury; or,
>
> (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the party requesting injunctive relief. *Fennell v. Butler*, 570 F.2d 263 (8th Cir. 1978).

After considering the evidence presented on January 3, 1979 by plaintiffs, the Court concludes that they have failed to satisfy either of the above standards for the following reasons:

Possible Irreparable Injury and Probable Success On the Merits

It is clear that the type of irreparable injury sufficient for obtaining a preliminary injunction must be more than the cost, anxiety and inconvenience of having to defend against a single criminal prosecution. *Independent*

Tape Merchant's Assoc. v. Creamer, 346 F.Supp. 456, 459-60 (M.D. Penn. 1972).

Plaintiffs, however, claim that they each have invested more than $10,000 in their business and property and that this investment and substantial profits therefrom would be lost if the statute is enforced against them. (See, Paragraph 8 of plaintiffs' complaint.) If the challenged statute merely prohibited the practices of massage parlors which involved "sexual contact", the Court would have serious doubts as to whether plaintiffs had made a sufficient showing of irreparable harm since they would be free to continue operating their massage parlors for any other legitimate purpose. However, §567.080 provides that a building used for "sexual contact" for pay is a public nuisance which the Attorney General, Circuit Attorney, or Prosecuting Attorney may seek to enjoin. The section further allows the Court to order that the premises not be occupied for a period not to exceed one year. The Court concludes that since a violation of the statute may result in a closing of plaintiffs' massage parlors for up to one year, plaintiffs have satisfactorily demonstrated irreparable injury.

To satisfy one standard for granting a preliminary injunction, plaintiffs must also demonstrate a likelihood of success on the merits of their constitutional challenges to the statute. While the following analysis is not meant to be a binding decision on the merits of the case, the Court at the present time is not convinced that plaintiffs could succeed on the merits of any of their constitutional challenges to the statute.

Plaintiffs allege that §567.010(3)(c), §567.010(1)(b) and §567.010(4) violate their rights to First Amendment freedom of speech, freedom of association and their right to privacy under the Ninth, First, Fourth, Fifth and Four-

teenth Amendments. Plaintiffs also allege that these particular sections violate the due process and equal protection clauses of the Fourteenth Amendment in that they are too vague, overbroad, not related to legitimate government interests and that plaintiffs are thereby denied the right to employment and to earn a living.

§567.010 provides as follows:

567.010. *Chapter definitions*

As used in this chapter, the following terms mean:

(1) *"Promoting prostitution"*, a person "promotes prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly

(a) Causes or aids a person to commit or engage in prostitution; or

(b) Procures or solicits patrons for prostitution; or

(c) Provides persons or premises for prostitution purposes; or

(d) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(e) Accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activity; or

(f) Engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution;

(2) *"Prostitution"*, a person commits "prostitution" if he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person;

(3) *"Patronizing prostitution"*, a person "patronizes prostitution" if

(a) Pursuant to a prior understanding, he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or

(b) He gives or agrees to give something of value to another person on an understanding that in return therefor that person or a third person will engage in sexual conduct with him or with another; or

(c) He solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another, in return for something of value;

(4) *"Sexual conduct"* occurs when there is

(a) *"Sexual intercourse"* which means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; or

(b) *"Deviate sexual intercourse"* which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person; or

(c) *"Sexual contact"* which means any touching, manual or otherwise, of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party;

(5) *"Something of value"* means any money or property, or any token, object or article exchangeable for money or property.

First Amendment Issue

In *United States v. Moses,* 339 A.2d 46 (D.C. Ct. App. 1975), c.d. 49 L.Ed.2d 373, appellees, charged with soliciting for prostitution in violation of the District of Columbia Code, challenged the constitutionality of the solicitation provision. The trial court held that the appellees' offer to engage in commercial sex was protected speech. In reversing this ruling, the court of appeals explained:

> [w]hat we are dealing with is a straightforward business proposal which may be regulated under the standards applicable to purely commercial advertising. . . Having determined the character of the speech at issue, we next consider whether it is protected by the First Amendment and, if so, to what extent. We conclude that solicitation for prostitution is not entitled to immunity under the First Amendment. *U.S. v. Moses,* supra at 52-53.

Further, the Court of Appeals in *Moses,* supra, determined that as a classic example of commercial speech this activity was subject to reasonable regulation like the provision in question. On the basis of this reasoning which the Court feels is applicable to the solicitation provisions of this statute, the Court does not believe §567.010(1)(b) and §567.010(3)(c) are in violation of the plaintiff's First Amendment rights.

Additionally, the Court does not believe that §567.010(4)(c) violates any of plaintiffs' rights to freedom of association or to express their own lifestyle.

Other courts in considering massage ordinances have ruled that the associational activities of owners of commercial massage parlors are purely commercial and do not come within the core protection of the right to association. *Bayside Enterprises, Inc. v. Carson,* 450 F. Supp. 696 (M.D. Fla. 1978). In *Bayside,* operators of adult entertainments sought declaratory and injunctive relief alleging the unconstitutionality of the city ordinance that regulated adult entertainment and services. While certain zoning restrictions were found not to withstand constitutional scrutiny, the Court upheld particular provisions regulating adult massage parlors. The portion of the statute regulating massage parlors established recordkeeping requirements and prohibited massages of persons by individuals of the opposite sex. While the Court recognizes significant differences exist between those regulations and the statute in question here, the Court believes that the court's evaluation of the plaintiffs' First Amendment claims are relevant. The Florida District Court found:

> Furthermore to the extent that the plaintiff's attack on the Code's massage-related provisions is grounded upon any alleged infringement of First Amendment rights of expression, that attack is frivolous. In this context the Court can perceive no communicative characteristics of any substance which would bring massage parlors within the ambit of the First Amendment's free speech clause. *Bayside,* supra at 710.

See also *Brown v. Haner,* 410 F. Supp. 399, 400 (W.D. Va. 1976). Further, it should be noted the regulation challenged does not prohibit plaintiffs from associating

but only prevent them from performing particular acts of commercial sex for hire.

The Court does not believe that plaintiffs' First Amendment claims are well taken and has not been made aware of any theory on which plaintiffs might succeed on the merits of their First Amendment claim.

Right to Privacy

Supreme Court decisions have recognized a constitutional right of privacy derived from certain "penumbras" of the Bill of Rights and applicable to the states via the Fourteenth Amendment for:

> personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'. . . This privacy encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing [citations omitted] *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 65-66, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973).

Appellants in *Blake v. State,* 344 A.2d 260 (S.Ct. Del. 1975) were challenging Delaware's prostitution statute which imposed a criminal penalty for individuals who engaged or offered to engage in sexual conduct for a fee. In support of the proposition that the prostitution statute impinged on their rights to privacy the parties cited *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), reh. denied, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694; *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969); and *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The Superior Court of Delaware pointed out that in those cases the rights involved were so personal that they were clearly fundamental, but concluded:

> This court would be constrained by logic and common sense from saying that those personal rights implicit in those cases are the same or can be of the same order as the public sale of sex and the human body. *Blake,* supra, at 262.

The context in which the proscribed activity takes place is important in determining the extent to which the activity may be prohibited. "The more public the context, the more permissible the control." *State v. Hicks,* 360 A.2d 150, 152 (S.Ct. Del. 1976). This conclusion was supported by the Supreme Court of Iowa in rejecting a contention that Iowa's prostitution law violated the right to privacy as set forth in *Griswold,* supra. *State v. Price,* 237 N.W.2d 813 (S.Ct. Iowa 1976). In *Price* the Court concluded that the right to privacy was not unqualified, and that prostitution was not a constitutionally protected activity. Because of the effect commercial sex may have on other members of the community, the Court determined that it may be regulated in situations where such regulation would be subject to constitutional challenges if imposed on consenting adults engaging in sexual conduct in the privacy of their home.

This Court does not believe that the sale of commercial sex is a fundamental right nor a right implicit in the concept of ordered liberty. Additionally, the context in which the activity regulated by §567.010(4)(c) occurs is a public place of business and not the privacy of one's home. The Court has grave doubts as to whether plaintiffs could ever be successful in challenging the statute on the grounds that they have a protectible privacy interest.

Fourteenth Amendment

Plaintiffs argue that the solicitation provisions of the statute violate the due process and equal protection clauses of the Fourteenth Amendment on the following grounds:

(1) the provisions are too vague;

(2) the provisions are overbroad; and,

(3) the provisions are not reasonably related to the achievement of any legitimate government interest and are an unreasonable exercise of the police power.

§567.010(4)(c) is alleged to violate the due process clause in all of the above respects and additionally for the reason that it denies plaintiffs the right to employment and to obtain income from the ownership of property. This section is also alleged to deny plaintiffs the equal protection of the laws by prohibiting conduct which if done for nothing would not be illegal. Additionally, plaintiffs urge that the law will be selectively enforced and that it is unconstitutional in that it provides unequal punishment for those who "patronize prostitution" and those who "promote prostitution".

Vagueness Issue

A person may not constitutionally be held "criminally responsible for conduct which he could not reasonably understand to be proscribed." *Rose v. Locke,* 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Before a statute can be found to be unconstitutionally vague within the meaning of the Fourteenth Amendment, the Court must find that the statute fails to inform a person of ordinary intelligence of the conduct which is forbidden. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227 (1972).

After reading the language of Chapter 567 R.S. Mo., the Court finds that this statute clearly sets forth the conduct which is prohibited. The fact that plaintiffs claim that particular provisions of this statute will apply to certain practices of massage parlors, further indicates that

the language is sufficiently clear to enable the average individual to understand what conduct is illegal under this statute—even prior to the time of its initial enforcement.

Plaintiffs have been unable to demonstrate satisfactorily to the Court any theory under which the statute might be declared impermissibly broad at a trial on the merits.

Police Power Regulation

Plaintiffs strenuously argue that the challenged sections of the new statute are not reasonably related to any legitimate government objective and are an unreasonable exercise of the police power. Plaintiffs suggest that the only purpose behind the prostitution statute was to prohibit the spread of venereal disease. Defendants contend that it is not possible for venereal disease to be spread by the type of sexual contact defined by §567.010(4)(c). In support of this proposition, affidavits from Drs. Elliott and Colom were offered into evidence at the hearing on January 3, 1979 (Exhibits 3 and 4).

In examining the validity of the exercise of state's police power in enacting this statute, it is important to determine what standard of review is to be applied. Where a statute does not regulate nor affect fundamental rights its constitutionality is judged on the basis of whether the law has some rational relation with a legitimate governmental interest. *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Only where a challenged statute affects fundamental rights must the statute be reviewed under the "compelling state interest" test. *McGowan,* supra; see *Cory v. City of Dallas,* 352 F. Supp. 977, 979 (N.D. Tx. 1972); and *Caesar's Health Club v. St. Louis Co.,* supra, at 786. In applying the rational basis test the exercise of the police power is presumed

to be constitutionally valid. *Bibb. v. Navajo Freight Lines*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). The Court does not believe that the sale of commercial sex is a fundamental right the regulation of which must be considered according to the compelling circumstances test.

It has long been recognized that it is a valid exercise of the state's police powers to regulate massage parlors on the basis of the public health, safety and morality. *Cory*, supra at 981. The same rationale has been utilized to uphold state's regulations of prostitution. See *State v. Blake*, supra and *State v. Hicks*, supra. Plaintiffs have placed considerable reliance on a December, 1977 decision by the Family Court of New York, *In Re P*, 400 N.Y.S.2d 455 (1977) declaring the New York prostitution laws unconstitutional. However, the trial courts of that state had previously upheld the statute finding unequivocally that the state has a legitimate interest in regulating the commercialization of sex, and that there is a sufficient nexus between prostitution statutes and legitimate legislative concerns of public health, safety, commerce and morality to preclude a court's interference with such enactments. *People v. Costello*, 395 N.Y.S.2d 139, 141-142 (S.Ct. Trial Term June 1, 1977). There are no cases indicating that the trial or appellate courts of New York have ever followed the reasoning of the family court in *In Re P*.

In rejecting a challenge that the Delaware prostitution statute was without a rational basis, the Court in *State v. Hicks*, offered numerous suggestions as to why a state might choose to regulate the activity. The factors enumerated included the following:

> (1) the strain public marketing of sex may place on the institution of marriage, (2) the possibility that innocent citizens may be affronted by unwanted solicitation, and (3) the state's concern over regulating the criminal manipulation that may surround the activity of prostitution. *State v. Hicks*, supra at 152-153.

In *Caesar's Health Club*, supra at 787 the St. Louis Court of Appeals concluded:

> We believe the ordinance here in question discloses on its face a purpose to protect and further the health, morality, and general welfare of the citizenry, and that it furthers its purpose in a reasonable way.

The mere fact that the regulation of venereal disease may not be the reason for prohibiting the conduct set forth in §567.010(1)(b), §567.010(3)(c) and §567.010(4)(c) does not mean the state does not have other legitimate reasons for enacting the law. Therefore, the Court concludes that it is unlikely that plaintiff could successfully demonstrate that the statute in question was an unlawful exercise of the state's police power.

Constitutional Right to Employment

Plaintiffs argue that the statute denied them the right to employment, to do business, to obtain income from the ownership of property and from conducting business. As plaintiffs point out, the Supreme Court has recognized:

> the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377 (1959).

This concept has been applied to state regulation through the due process clause of the Fourteenth Amendment. However, it is also clear that the states may regulate and control businesses which the legislation determines may threaten the public safety, welfare, and morals. An

Illinois ordinance prohibiting massage parlors from providing customers with sexual massages was challenged as infringing the plaintiffs' fundamental right to work. The Appellate Court of Illinois rejected this challenge on the basis that the ordinance tended to preserve the health, morals and safety of the citizens; and therefore determined:

> massage establishments and those who give massages may be licensed and regulated under the police power of the State of Illinois and its municipalities without contravening the due process rights of those who practice massage. *Wes Ward Enterprises, Ltd. v. Andrews,* 355 N.E.2d 131, 136 (App. Ct. Ill. 1976).

The Court does not believe that plaintiffs could successfully demonstrate the regulations challenged violate their right to employment free of *unreasonable* government interference.

Equal Protection

The remainder of plaintiffs' challenges to this section are based on claimed violations of the Equal Protection clauses. Unreasonable classifications are alleged to have resulted from the classifications which (1) prohibit conduct if done for something of value which would be legal if done for free, (2) will result in selective enforcement of the laws, and (3) provide for different penalties between promoters and patronizers of prostitution.

The Court can find nothing in the language of the statute that would appear to promote selective enforcement by law enforcement officials. It would be purely speculative for the Court prior to the time any arrests or prosecutions have taken place under the law to consider the question of selective enforcement. This question has been raised prematurely and would not appear to be an issue

on which the Court could make any finding concerning the likelihood of plaintiffs' success on the merits at the present time.

In the circumstances of this case, the plaintiffs' equal protection claims must be evaluated according to the standards set forth in *McGowan v. Maryland*:

> Although no precise formula has been developed, the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan,* supra at 399.

In *Blake v. State* appellants had levied a number of similar equal protection challenges against the state's prostitution statute including a contention that the penalties levied against the seller were greater than the punishment provided for other participants in the activity, and thus were unconstitutional. The court concluded that this was not unreasonable for:

> The 'seller' is more strictly controlled and more severely punished in any number of criminal statutes. More importantly, however, there is a legitimate and reasonable basis to conclude that curtailment of the seller's activities will reduce the incidence of criminal activity in a multi-party sequentially related crime situation. *Blake,* supra at 262.

In this case plaintiffs challenge the penalty differential between promoting and patronizing prostitution. This is in effect a penalty difference between the buyer and seller of the proscribed activity as in *Blake*. Like the Delaware court, this Court believes that the state may have legitimate reasons for imposing a greater penalty against the promoter of proscribed services than the buyer. Given the many legitimate reasons which might justify such a differential, the Court does not believe that plaintiffs are likely to succeed on the merits of this claim.

Finally, plaintiffs allege a denial of equal protection because conduct that is not prohibited becomes illegal if done for money or something of value. Where fundamental rights are not involved, as in this case, the equal protection clause does not deny government the power to treat different classes in different ways, but only denies government the power to accord different treatment to persons placed into different classes on the basis of criteria wholly unrelated to legitimate government objectives. *Conn. State Federation of Teachers v. Bd. of Ed. Members*, 538 F.2d 471, 483 (2nd Cir. 1976). As previously pointed out, significant distinctions can be drawn between regulations directed at commercial sexual activity and regulations directed towards individuals in the privacy of their homes. The Court feels that there is a rational basis for treating these two categories of individuals differently and therefore, it is unlikely that plaintiffs will be able to successfully argue that this statute violates the equal protection clause of the Fourteenth Amendment.

Title VII Claim

Plaintiffs' complaint contains an allegation that the statute prohibits bi-sexual massages in violation of Title VII, 42 U.S.C. §2000(e). Nothing in the language of the statute would appear to prohibit bi-sexual massages. In contrast, the cases cited by plaintiffs on this point involved interpretations of state statutes that clearly and explicitly forbid bi-sexual massages. Even though the Court can find no basis for accepting this interpretation of the statute, assuming plaintiffs' contention to be true, the issue of whether that type of statute violates Title VII has been decided by the Supreme Court. In *Rubenstein v. Township of Cherry Hill*, 417 U.S. 963, 94 S.Ct. 3165, 41 L.Ed.2d (1974), the Supreme Court of New Jersey ruled that a municipal massage parlor licensing ordinance barring operators from massaging persons of the opposite sex constituted a reasonable exercise of the police power and did not violate Title VII of the 1974 Civil Rights Act nor the Fourteenth Amendment. On appeal to the U.S. Supreme Court, the issues of whether the ordinance violated Title VII or the equal protection and due process clauses were raised. The Supreme Court dismissed the appeal for want of a substantial federal question. See 42 L.W. 3637. Because the Court in *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), has determined that this type of a dismissal is a binding adjudication on the merits, this Court would be foreclosed from ruling in plaintiffs' favor on the Title VII claim if it were in fact an issue in this case.

For all of the above reasons, the Court finds that plaintiffs did not demonstrate a likelihood of success on the merits of their constitutional challenge. However, the Court must also consider the alternative test for granting a preliminary injunction.

SUFFICIENTLY SERIOUS QUESTION GOING TO THE MERITS AND BALANCING OF THE HARDSHIPS

The Court may also grant a preliminary injunction if the plaintiffs can show a sufficiently serious question going to the merits to make them a fair ground for litigation and a balance of the hardship tipping toward the party requesting preliminary relief. For the detailed reasons set forth above, the Court finds that plaintiffs' constitutional allegations do not contain sufficiently serious questions going to the merits to make them fair ground for litigation. Research by the Court has indicated that the majority of the case law is clearly contrary to plaintiffs' positions.

Even if it could be said that plaintiffs had made this showing, the Court would have to find that the balance of the hardships does not tip toward plaintiffs. Plaintiffs did not demonstrate the extent to which their business involved the type of sexual massage prohibited by §567.010(4)(c). In the absence of any such showing, it would not appear an unreasonable hardship for plaintiffs to continue operating their massage parlors but temporarily discontinue the practices forbidden by Chapter 567, R.S. Mo. until a decision on the merits can be reached.

For all of the reasons outlined above, the Court finds that plaintiffs did not successfully demonstrate their entitlement to a preliminary injunction under either of the tests established by the Eighth Circuit in *Fennell v. Butler*, supra. Consequently, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction was denied on January 9, 1979.

/s/ Russell G. Clark
Russell G. Clark, Judge
United States District Court

Dated: January 12, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1079.
September Term, 1978

J. B. K., Inc., etc., et al,
Appellants,

vs.

Norman Caron, et al,
Appellees.

Appeal from the United States
District Court for the
Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 23, 1979